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SUPREME COURT, U.S.

No. 287

In the Supreme Court of the United States

October Term, 1948.

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,
vs.
A. H. STONE, CHAIRMAN STATE TAX COMMISSION.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF of APPELLANT.

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CITATION OF OPINION IN COURT BELOW.

Interstate Oil Pipe Line Company v. Stone, 35 So. (2d) 73 (1948).

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 287

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,
vs.
A. H. STONE, CHAIRMAN STATE TAX COMMISSION.

BRIEF *for* APPELLANT.

Statement of Jurisdiction.

Section 237 (a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344 (a)), is believed to sustain the jurisdiction of this Court.

The invalidity of the Mississippi statute, as applied, because of its repugnancy to the Commerce Clause of the Constitution of the United States, was raised at the beginning of and has been urged throughout all the proceedings in the state courts.

In its declaration filed in the trial court for recovery of the tax paid under protest, appellant alleged the facts concerning the business conducted by it and that the taxes are "in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3" (Par. XIII, Transcript of Record, page 6), and that "if

the said General Sales Tax Law" is "applicable to plaintiff in the levy of the said sales taxes and use taxes, the said laws are void and of no effect because" they impose a license on interstate commerce, place a burden on plaintiff's privilege of carrying on interstate commerce, constitute a direct burden on the transportation of crude oil exclusively in interstate commerce, constitute a tax directly on interstate commerce or the privilege of engaging therein, are an attempted regulation of interstate commerce, and attempt to usurp the powers delegated to Congress by the Constitution of the United States. (Par. XIV, Tr. 7). Defendants' pleading denied these allegations (Pars. XIII, XIV, Tr. 27). The trial court rendered judgment against appellant.

On appeal to the Supreme Court of Mississippi, an assignment of error was (Tr. 43):

> "That if the General Sales Tax Law" * * * (is) "applicable to appellant's activities as set out in this suit, then said laws are void and of no effect by reason of the fact that they are in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States, known as the Commerce Clause."

In its opinion of April 26, 1948, the Supreme Court of Mississippi said as to these taxes (Tr. 45), 35 So. (2d) 74:

> "The liability therefor is contested by the pipe line company on two grounds: * * * (2) that the taxpayer's transportation of the oil was in interstate commerce, and that, therefore, the imposition of both of the taxes here in question violates the commerce clause of the Constitution of the United States * * *."

That court held that appellant's transportation of crude oil was a local activity, did not constitute interstate commerce and that the tax on the revenues received by appellant for such transportation was properly collected. In so holding, the court of necessity passed on the federal consti-

tutional question raised by the appellant, and sustained the validity of the state statute as applied to appellant's business activities.

Where a federal right is concerned, the state court's characterization of the tax is not conclusive and does not relieve the Federal Court of the duty of considering the real nature of the tax and its effect upon the federal right asserted. *United States* v. *Allegheny County*, 322 U. S. 174; *Reconstruction Finance Corp.* v. *Beaver County, Pennsylvania*, 328 U. S. 204; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69.

Appeal is the proper method of reviewing a state court judgment which upholds a state tax statute over objection that the statute, as applied, imposes an unconstitutional tax upon interstate commerce, although the state court, in upholding the statute as so applied, construes the statute as applying only to intrastate commerce, as it defined it. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

This Court noted probable jurisdiction of this case on October 18, 1948.

Statement of the Case.

A. *The Question.*

This is an appeal from a judgment of the Supreme Court of the State of Mississipi rendered April 26, 1948, and affirmed by overruling Suggestion of Error on June 14, 1948, wherein the appellant, Interstate Oil Pipe Line Company, a common carrier, was denied the right to recover from A. H. Stone, chairman of the State Tax Commission of Mississippi, privilege tax in the amount of $20,296.36 for the years 1944 and 1945 and for the period from January 1 to June 30, 1946, which appellant paid under protest and

brought this suit to recover, with interest and costs. Although contained in the sales tax section of the Mississippi Code, the tax is in fact a privilege tax and has been so designated by the Mississippi Supreme Court in its decision in this case. It is a privilege tax on account of business engaged in, computed, in this case, at 2% of gross income from the business of operating a pipe line. The gross income upon which the tax in dispute was collected was derived from transporting oil by pipe line from one point in Mississippi to another and there loading it aboard tank cars for shipment to destinations outside the state. It was appellant's contention in the Mississippi Supreme Court that said tax was not due by reason of the fact that it was imposed on the gross receipts derived from interstate commerce which are specifically exempt under the provisions of the Mississippi Sales Tax Law and which the State of Mississippi is prohibited from taxing by the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States, and that the Mississippi statute as applied in this case was unconstitutional and void. The Mississippi Supreme Court upheld the tax on the grounds that the commerce conducted by the appellant which is here in question was in fact *intrastate* commerce. It did not find that the gross receipts from interstate commerce were taxable under the act nor that the state had the power to levy such a tax on interstate commerce under the "Commerce Clause" of the United States Constitution.

The question at issue before this Court is whether or not by so defining the activities of this appellant as *intrastate* commerce, the Mississippi Supreme Court has in fact upheld a tax on *interstate* commerce which the State of Mississippi is prohibited from levying by the provisions of Article I, Section 8, Clause 3, of the Constitution of the

United States. This question resolves itself into two points of consideration which will be taken up and discussed in order in this brief:

(1) Is the transportation here at issue interstate or intrastate in character?

(2) If the transportation is interstate, is a state privilege tax based on the gross receipts therefrom prohibited by the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States?

B. *The Facts.*

There is no dispute as to the facts in this case which were stipulated in an Agreed Statement of Facts executed on behalf of counsel for both parties and filed in the record of this proceeding in the trial court. (See Tr. 29.) For the convenience of the Court the following is a brief summary of the more important facts pertinent to this controversy:

Plaintiff, Interstate Oil Pipe Line Company, is a Delaware corporation duly qualified to do business as a foreign corporation in the State of Mississippi. The company has paid for each of the years involved in this action substantial amounts of franchise and income taxes to the State of Mississippi and has paid *ad valorem* taxes on its properties. It is engaged in Mississippi solely in the business of transporting crude petroleum as a common carrier for various shippers for hire and does not own any of the oil so transported. During the period from January 1, 1944, to June 30, 1946, inclusive, plaintiff constructed and operated pipe line gathering systems for the transportation of oil from lease tanks situated at or near oil wells in various fields in Mississippi to loading racks located adjacent to railroads from which plaintiff loaded the oil into railroad tank cars for shipment to destinations outside the State of Mississippi. Plaintiff is an interstate carrier operating under the juris-

diction of the Interstate Commerce Commission and all of its transportation of oil in Mississippi is covered by tariffs which are regularly published and filed with the Interstate Commerce Commission. The regulations of said tariffs provide that the company will receive crude petroleum as therein defined from lease tankage within the area of its gathering system, for transportation to destinations named therein, for *interstate transportation beyond* under terms and conditions set out therein. All oil which is gathered and loaded aboard tank cars is tendered for shipment by the owners of the oil at the lease tanks in the producing fields prior to the movement of the oil. The shipper furnishes the company a "tender of shipment" form for each shipment which specifies the quantity of oil to be moved, the origin and ultimate out-of-state destination and the tariff under which the shipment is made. It also contains shipping instructions as to consignee, route of shipment, etc. After receipt of the "tender of shipment" form covering a particular shipment the oil is gauged in the specified lease tanks by representatives of the shipper and the company and the quantity of oil to be shipped is then pumped out of the lease tanks through the company's pipe lines to the tank-car loading rack, or, if tank cars have not been spotted, to the working tanks adjoining the loading racks to facilitate handling until the cars for the railroad shipment have been spotted on the sidetracks, usually a matter of only a few days and never more than a week. The oil is then pumped into the tank cars and the company procures a bill of lading for the shipment in accordance with directions contained in the "tender of shipment" form previously furnished, showing consignor of the oil as shipper and the company as agent of the shipper and setting out the out-of-state destination previously specified by the shipper. For its services in gathering the crude oil, transporting it from

the lease tanks in the producing fields to the railroad and loading it aboard tank cars the company is paid by the shipper at the rate per barrel stipulated in its applicable Interstate Commerce Commission tariff. In some cases interstate trunk pipe lines are constructed into areas from which the oil was previously shipped by tank car and in such cases the railroad loading racks are abandoned and the gathering line system from the wells is connected to the interstate trunk line and thenceforth the oil is pumped to destinations outside the state exclusively by pipe line. Defendant concedes that the transportation of oil from the producing wells to destinations outside the state solely through the medium of plaintiff's pipe line system is exempt from the Mississippi privilege tax. However, defendant contends that where plaintiff's gathering line systems are connected to railroad loading racks instead of to its own interstate trunk pipe lines and the oil is transported by plaintiff from the wells to the railroad and loaded into cars and shipped by rail to out-of-state destinations, the movements from the wells to the railroads are intrastate commerce and that the Mississippi privilege tax applies. The Tax Commission sustained this contention and plaintiff paid the tax assessed under protest and brought suit for refund in the Circuit Court for the First District of Hinds County, Mississippi. From a decision of that court in favor of defendant, plaintiff appealed to the Mississipi Supreme Court. The Mississippi Supreme Court sustained the lower court by 3 to 2 decision with two justices (Tr. 58) holding appellant's activities were exempt from tax by reason of being "interstate in character." From that decision appellant brings this appeal under Section 237 (a) of the Judicial Code.

C. *The Constitutional and Statutory Provis* s.

The appellant contends that the Mississippi statute as applied in this case is unconstitutional and void under the

provisions of Article I, Section 8, Clause 3, of the Constitution of the United States which is in pertinent part as follows:

> "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

The Statutes of the State of Mississippi, the validity of which are drawn in question by virtue of the fact that the Supreme Court of Mississippi has construed them as applying to the particular operations of appellant here in controversy, are contained in Sections 10,105 and 10,109, Title 40, Chapter 3, Volume 7 of the 1942 Code of Mississippi, as amended, and are in pertinent part as follows:

> *10,105.* There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows (see sections following).
>
> *10,109:* * * * Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business. * * *
>
> There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America * * *.

Assigned Errors of Lower Court.

Appellant respectfully maintains that the Supreme Court of the State of Mississippi in its decision of this case erred in the following respects:

(1) The said court erred in not holding that appellant's transportation of crude oil by pipe line constituted interstate commerce, and

(2) The said court erred in not holding invalid as applied the statute of Mississippi imposing a tax of 2% of the gross receipts of the appellant's business of transporting crude oil by pipe line for hire for the reason that said statute as applied is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause.

ARGUMENT.

The argument of appellant will be presented under two main headings in answer to the two main considerations inherent in the question before the Court as set out above. The argument will seek to prove:

A. Appellant's operations as a common carrier in gathering and transporting by pipe line and in loading oil aboard tank cars for shipment by railroad to destinations outside the State of Mississippi are part of the interstate transportation of said oil and are in interstate commerce, and,

B. The state does not have the authority to levy a tax on the privilege of carrying on interstate commerce measured by the gross receipts derived by the appellant, a common carrier, from said interstate commerce.

A.

Appellant's Operations as a Common Carrier in Gathering and Transporting Oil by Pipe Line and in Loading Said Oil Aboard Tank Cars for Shipment by Railroad to Destinations Outside the State of Mississippi Are Parts of the Interstate Transportation of Said Oil and Are in Interstate Commerce.

The first point for consideration in deciding the question involved in this case is whether or not under the agreed statement of facts herein the activities of the appellant are interstate commerce within the meaning of the Commerce Clause.

There have been a multitude of cases in both the Federal and state courts attempting a definition of "interstate commerce."

At first glance the opinions in these cases might seem confusing. The courts in some cases have seemed to stretch the definition to extend the regulatory power of the Federal Government and in other cases to contract the definition to allow the states as much latitude as possible in their taxation. Each case, concerned with its own particular facts, has set up its own test of what constitutes interstate commerce. The key to this apparent confusion lies in Mr. Justice FRANKFURTER's statement in the recent case of *Freeman* v. *Hewit*, 329 U. S. 249, 252:

> "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

Looking only at the cases that have been decided by this Court on the question of interstate commerce in connection with the power of the state to tax, we can evolve a number of definite tests as to what constitutes interstate commerce. No one case has set out all these tests, but all

the tests the courts have set up are encompassed in one or another of these categories. These tests are as follows:

1. There must be movement across a state line.
2. There must be continuity of movement between the operation in question and the operation of crossing the state line.
3. The essential character of the operation as shown by intent and all surrounding factors must make it an integral part of the interstate shipment.

Ruling Case Law, Volume 5, Commerce, Section 24, comes as close to summarizing the tests as to what constitutes interstate commerce as any reference found. There the following language is used:

> "A carrier, though operating a line wholly within a state, is engaged in interstate commerce when it forms a link in a continuous transportation from one state to another and when the ultimate destination is some point in another state, to be reached on a continuous journey, a shipment from one point to another within the same state is interstate commerce, although a bill of lading is given for the interstate part and limits the liability of the carrier on delivery to the connecting carrier, that is, whether the goods are carried upon through bills of lading or are rebilled by the several railroads."

Authority for these principles of law is fully established in the cases cited and discussed in detail hereinafter. We will show that the case at bar meets all the tests for interstate commerce.

1. ***The oil involved in this shipment moves across a state line.***

There can, of course, be no interstate commerce without movement across a state line. There has never been

any question or dispute in this case as to whether or not the oil moved by appellant was ultimately transported out of the State of Mississippi. In the original agreed stipulation of facts filed in the trial court, the attorneys for both parties agreed as follows (Tr. 32):

> "All the oil gathered, transported and loaded aboard tank cars with respect to which sales and use taxes were paid, recovery of which is sought herein, was consigned for shipment to destinations outside the state and was in fact transported by the railroads from points of loading to destinations outside the State of Mississippi in continuous interstate commerce."

In its opinion in the case, the Supreme Court of Mississippi has stated 35 So. (2d) 73, 77 (Tr. 50):

> "* * * it was known that all of the oil transported by pipe line from producing leases or elsewhere would be transported to destinations outside the state either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the state * * *. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here."

The question to be answered then in determining whether the operations herein were interstate commerce is whether or not they had the proper relation with the railroad movement to constitute them a part of the acknowledged interstate movement by the railroad.

2. There is continuity of movement between the shipment by the pipe line and the shipment by the railroad thus linking the appellant's movement into interstate commerce.

The second test in determining whether or not a ship-

ment is interstate commerce is the continuity between the movement in question and the movement across the state line. Perhaps the best way to establish the continuity in the present case is to take a factual situation where all parties are agreed there is continuity and where there is no question but that the operation is interstate commerce and then compare the facts in that case with the facts in the case at issue. Appellee has conceded throughout this case and the Supreme Court of Mississippi has stated in its opinion (35 So. (2d) 73, 77) that where the appellant gathers the oil and then ships it out of the state *via* its trunk lines:

> "* * * it would of course constitute that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States,' and this would be equally true as to the movement by rail of oil from a local shipping point to its destination outside the state in crossing the state line." (Tr. 50)

The all-pipe line shipment admittedly then is a situation where there is continuity between the gathering operations and the shipment out of the state. In the present case the appellant gathers the oil, loads it aboard tank cars, and the railroad then ships it out of the state. The appellee contends and the Mississippi Supreme Court sustains the contention that the gathering operations are not part of interstate commerce, but are simply in preparation for the interstate movement. We shall examine the distinguishing points between the situation where there is admittedly continuity and that where appellee claims there is none and determine whether singly or in combination any of these factual distinctions break the continuity. The distinguishing points may be itemized as follows:

a. In the present case there is movement by two carriers rather than one.

b. The mode of transportation in the present case is changed from pipe line to railroad.

c. The transportation by the appellant in the present case is entirely within Mississippi.

d. There are separate charges and no through bill of lading in the present instance.

e. There is temporary stoppage of the shipment in the present case, while the oil is transferred from one type of conveyance to another.

We shall endeavor to show point by point that none of these facts change the character of the movement or destroy the continuity and, therefore, that the one situation is just as much interstate commerce as the other.

***a.* Shipment by two or more carriers does not break the continuity:**

This Court when confronted with the situation has always held and the principle is well established that two or more carriers may share in the interstate movement of goods with only one actually crossing the state line and yet all be considered as engaging in interstate commerce. In fact, so far as we have been able to determine, no serious contention has ever been made that mere handling of goods by two or more carriers affects the nature of the shipment. There are an almost endless number of cases, however, which hold interstate commerce to exist where two or more carriers are involved. See *The Daniel Ball* v. *United States*, 77 U. S. 557; *Norfolk & Western Ry. Co.* v. *Pennsylvania*, 136 U. S. 114.

This doctrine has been brought right down to date in its application to pipe lines by *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, decided by this Court on June 16, 1947. There gas not oil was being

transported. The first carrier transported the gas from the producing wells through its gathering lines to main trunk lines and thence to a compressor station. At that point another carrier increased the pressure of the gas and moved it out of the state. Mr. Chief Justice Vinson, writing the opinion of the court, held that the entire movement of the gas from the wells to final destination was interstate commerce. (See quotation from this case, page 37.)

b. Shipment by two or more modes of transportation does not destroy the continuity:

This Court has also uniformly held that where two carriers are jointly engaged in moving a product, the continuity of movement is not broken by the fact that they may not be the same type of carrier. Thus in the *Daniel Ball* case, 77 U. S. 557, the carrier involved in the case was a boat which moved goods only between points in the same state, but the court in deciding that the boat was engaged in interstate commerce, since it carried property originating or destined beyond the state line, did not even bother to discuss whether the connecting carriers were railroads, stagecoaches, or other boats. The clear and only inference is that it did not matter. Many more recent cases have involved facts where there was a definite change in mode of transportation: There is a change in mode of conveyance from railroad to ship in *Railroad Commission* v. *Texas & Pacific Railway Company*, 229 U. S. 336. There is a change from handling by a stevedoring company to movement by ship in *Puget Sound Stevedoring Co.* v. *Tax Commissioner of State of Washington*, 302 U. S. 90, and in the more recent case of *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422. There is a change from railroad to motor cab and back to railroad in the recent case of *United States* v. *Yellow Cab*, 332 U. S. 218. A case involving two modes of

transportation where one of the carriers is a pipe line is *Clark v. Atlantic Pipe Line Company*, 134 S. W. (2d) 322. There a pipe line company originated the movement and then transferred the oil to ocean tankers. Additional cases could be cited *ad infinitum*, but we believe the point is so well established and generally accepted that further citations would only be repetitious.

c. Movement entirely within a state may have continuity with a movement beyond state lines and thereby be part of interstate commerce:

The doctrine is also well established that operations entirely in one state may be interstate commerce. In 11 American Jurisprudence, Commerce, Paragraph 65, the rule is stated thus:

> "An agency operating entirely within the limits of a state may nevertheless be engaged in interstate or foreign commerce. Thus, when the ultimate destination is some point in another state, to be reached by a continuous journey, a shipment or transportation from one point to another within the same state is interstate commerce; and where there was an intention to make a through shipment to the point of final destination, a similar rule is usually held to prevail with respect to a shipment of goods from another state over a connecting line entirely within the state, irrespective of whether there was a common arrangement between the carriers. The interstate character of a through shipment is not affected by limitations on the liability of the several carriers to their own lines or by the fact that goods consigned to a point outside a state are delivered before the state line is reached."

The *Daniel Ball* case, decided in 1871 and previously cited herein, is one of the leading cases on this point. The Daniel Ball was a steam vessel plying the Grand River in

Michigan between the cities of Grand Rapids and Grand Haven and transporting merchandise between those points. Part of this merchandise had come into Michigan from out of the state and part was destined for ports and places beyond the state line. Mr. Justice FIELD in writing the opinion for the United States Supreme Court said of the Daniel Ball, 77 U. S. 557, 565:

> "So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction."

The *Daniel Ball* has been cited with approval again and again.

See also *United States* v. *Colorado & N. W. R. Co.*, (C. C. A. 8) 157 Fed. 321, 15 L. R. A. (NS) 167, where the company, to use the language of the court, 157 Fed. 323, was:

> "a common carrier which operates a railroad [narrow gauge] entirely within a single state, and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, free from any common control, management, or arrangement with another carrier for a continuous carriage or shipment thereof, * * *."

All goods have to be transferred from broad gauge lines

to this narrow gauge road. The Eighth Circuit Court held it to be in interstate commerce and certiorari was denied by the United States Supreme Court in 209 U. S. 544.

The same doctrine has frequently been applied to pipe line operations entirely within a state. *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550; *Clark* v. *Atlantic Pipe Line Co.*, 134 S. W. (2d) 322.

The doctrine has been brought right down to date by this Court in *United States* v. *Yellow Cab Co., et al.*, 332 U. S. 218, decided on June 23, 1947. There one of the defendants, Parmelee Transportation Company, was operating special unlicensed cabs to transport passengers and their luggage between railroad stations in Chicago, pursuant to exclusive contracts with the railroads and railroad terminal associations. Mr. Justice MURPHY in the opinion of this Court states, at page 228:

> "The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565, 19 L. ed. 999, 1002. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed it is an integral step in the interstate movement."

The Doctrine was also applied to pipe lines in the last term of this Court in *Interstate Natural Gas Co.* v. *Federal Power Comm.*, 331 U. S. 682.

See also *Southern Pacific Terminal Co.* v. *Interstate*

Commerce Commission, 219 U. S. 498; *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61; *Puget Sound Stevedoring Company* v. *Tax Comm. of State of Washington*, 302 U. S. 90; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422; *Houston Direct Navigation Co.* v. *Insurance Co. of North America*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713.

***d.* Local bills of lading and separate charges do not affect the continuity of the movement:**

The fact that there is no through bill of lading and that the appellant's charge for its services is made separately from the railroad's charge is immaterial and does not break the continuity. Such things have been held to be some evidence of intent but here the intent has been clearly established otherwise. Except as evidence of intent the local bill of lading is purely a matter of form which the courts will look through to the substance. *Superior Oil Company* v. *State of Mississippi*, 280 U. S. 390. In fact if it had been thought necessary under the facts in the case at bar to have a through bill of lading to back up the clear intent that the oil was to be shipped out of the state, the appellant, under the Interstate Commerce Act has the authority and could arrange for such handling. It has not been done because it would be more cumbersome for the pipe line company to issue joint tariffs with the railroads for transportation to all possible out of state rail destinations.

American Jurisprudence clearly states the rule of law on this point in Volume 11, Commerce, Paragraph 64:

> "It is the general rule that the form of the bill of lading or contract of carriage, although evidentiary, is not conclusive as to the character of the transportation, and where commodities are in fact destined from

one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder."

Again in 11 American Jurisprudence, Commerce, Paragraph 71:

"Nor do formalities such as the forms of billing and mere changes in the methods of transportation affect the continuity of the transit as regards its interstate character."

One of the leading cases on this question is *Railroad Commission* v. *Texas & Pacific Railroad Company*, 229 U. S. 336. There the Louisiana Railroad Commission had issued orders which the railroad wished to void on the grounds that it was engaged in interstate commerce. The shipments there in question were under local bills of lading providing for the shipment of freight from points in Louisiana to New Orleans where the goods were delivered to the shipper's or consignee's order. The articles shipped were intended by the shippers to be exported to foreign countries. The shippers held the cars on the railroad track until sufficient cargo was accumulated to fill export orders and until arrangements could be made for transportation. This Court in finding that the shipments were in interstate commerce, held as follows, 229 U. S. 341:

"The principle enunciated in the cases were that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of

their transportation to their destination except what was necessary for transshipment at New Orleans."

Another case early establishing this doctrine was that of *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R. Co.*, 233 U. S. 479, where it was held that a carrier could not, by separating the rate into its component parts, charging local rates, and issuing local waybills, convert an interstate shipment into one in intrastate commerce, thereby depriving the shipper of the interstate rate.

In *Illinois Central R. Co.* v. *De Fuentes*, 236 U. S. 157, the Louisiana Railroad Commission attempted to regulate the switching operations of the railroad. It was admitted that the railroad published "terminal tariffs covering switching" and that charges therefor were separately rendered. But this Court, in finding the switching was interstate commerce, held, page 163:

> "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement, and not the form of the bill of lading, determines the character of the commerce involved. And generally when this interstate character has been acquired it continues, at least, until the load reaches the point where the parties originally intended that the movement should finally end."

This doctrine has been applied to pipe lines in *Clark* v. *Atlantic Pipe Line Co.*, 134 S. W. (2d) 322. There the pipe line company gathered oil from various fields in Texas and transported it to points on the Gulf Coast. It had separate charges for gathering and trunk line operations and its "bill of lading" or tender of shipment covered transportation entirely within the State of Texas. At the coast this oil was temporarily stored until shipping was available and

the right amount of the right kind of oil was on hand. This usually involved a delay of from one to two weeks, then the oil was moved by steamship to other states and foreign countries. The state contended the pipe line business was intrastate on the grounds that the oil traveled under local bills of lading and that it was delayed in transit and stored pending the arrival of ships. The court said, pages 326-327, that these contentions of the state,

> "have been with such unanimity adversely adjudicated that only a brief statement of the effect of the holdings and citation of one or more supporting authorities is necessary * * *. 'The nature of a shipment is not affected by the fact that the transaction is initiated and completed under a local bill of lading which is wholly intrastate.'"

The rule was also applied in *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265. There the pipe line company made one charge for gathering oil, made another charge for "storage" and then made a trunk line charge, usually in the form of a joint tariff, for shipment out of the state. Because of their system of charging, the state claimed the right to lay a tax of 2% per barrel on the oil gathered. This Court held the tax invalid as a burden on interstate commerce when applied to oil which eventually was transported out of the state. Mr. Justice HOLMES in the opinion wrote, page 272:

> "The charges for gathering and storage seem to us not to affect the case * * *. The oil runs into a tank on one side and out on the other. The tank may be regarded as a pipe of larger size * * *. As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax, to be valid, 'must not, in its practical effect and operation burden interstate commerce.' It appears to us as a practical matter that the transmis-

sion of this stream of oil was interstate commerce from the beginning of the flow * * *."

This doctrine that separate charges do not destroy the continuity necessary for interstate commerce was reiterated in *Puget Sound Stevedoring Co.* v. *Tax Comm. of the State of Washington*, 302 U. S. 90, and was brought down to date in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422. In the latter case there was involved the validity of a gross receipts tax as applied to the business of stevedoring companies in loading and unloading vesels employed in interstate and foreign commerce. In his summation Mr. Justice REED said, page 433:

"Stevedoring, we conclude, is essentially a part of the commerce itself * * *."

In these stevedoring cases as in the case here at bar the activities of the company which the state sought to tax were completed entirely within the state, another company and a different type of carrier were involved in moving the goods out of the state, and the stevedoring company separately charged and was separately paid for its activities. The facts in the case at bar are stronger than those in these stevedoring cases in that (*1*) appellant is a common carrier under the regulation of the Interstate Commerce Commission, (*2*) there is actual transportation of the goods in our case prior to the loading operation.

It might be well to point out here that these stevedoring cases cannot be distinguished from the case at bar on the grounds that they are decided under rules of maritime law and that the federal government has always controlled maritime activities. As mentioned hereinbefore, the company in our case is subject to the control of the federal government through the Interstate Commerce Commission.

All pipe line activities since the amendment of the Interstate Commerce Act in 1906 have been just as much subject to federal regulation as has been maritime commerce. The Interstate Commerce Act, as amended June 29, 1906, and as set out in 49 U. S. C. A. 1, provides as follows:

> "(1) the provisions of this chapter shall apply to common carriers engaged in * * *,
>
> (b) the transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water."

We might also mention in passing that no logical contention can be made that the cases we have cited dealing with foreign commerce are distinguishable on that ground. In the *Carter & Weekes* case both foreign commerce and interstate commerce were involved. Mr. Justice REED wrote, 330 U. S. 425:

> "We do not find it necessary to consider separately interstate and foreign commerce. The Commerce Clause covers both."

On the point of local bills of lading see *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U. S. 166; *United States* v. *Erie R. Co.*, 280 U. S. 98; *Houston Direct Nav. Co.* v. *Insurance Co. of North America*, 32 S. W. 889.

The Supreme Court of Mississippi approved this doctrine in its opinion in this case. The court in 35 So. (2d) 73, 78 (Tr. 51), stated:

> "In other words, neither the form of contract nor method of billing is controlling on the question of whether the pipe line company was employed to do more than render a local service for the owner of the oil * * *."

e. Temporary stoppage of the shipment in the course of transportation does not destroy the continuity:

Our last point with respect to continuity is set out very well in 11 American Jurisprudence, Commerce, Paragraph 71, as follows:

> "On the other hand, an interstate movement which has begun may be regarded as continuing so as to maintain the immunity of the property from state regulation and taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement."

One of the most frequently cited cases on this point is *Carson Petroleum Company* v. *Vial*, 279 U. S. 95. In that case the company sought to avoid the levy of an *ad valorem* tax on oil in storage tanks on the grounds that said tax was an interference with interstate commerce. The company owned and operated a system of tanks and pumping equipment for receiving the contents of railroad oil tank cars, and thereafter loading the oil aboard ships for foreign commerce. The oil in each railroad tank car was not segregated or assigned or destined to any particular cargo or shipment aboard, but was pumped into a storage tank, which had the capacity of many tank cars, and was held there until a sufficient quantity of oil was accumulated to make up a cargo or until the arrival of a ship. The Court held in that case that the oil in storage was none the less in interstate commerce and hence not subject to the tax. Mr. Chief Justice TAFT in writing the opinion of the Court gave a very comprehensive review of the authorities on the continuity of transit. On the authority of these cases it was held that the storage was only incidental to the foreign commerce and that it was a necessary part thereof. The storage in that case was for the identical reason that there

is delay in transit in our case, *i. e.*, transfer of the oil from one carrier to another. The Court in the *Carson* case emphasizes the fact that there was and could be no local business at the point of storage. The same thing is even more true, if possible, in our case. The storage tanks and loading racks here are at isolated railroad sidings where nothing could possibly be done with the oil other than put it aboard railway tank cars. The duration of stoppage in our case was limited to the time required for the railroad to spot the tank cars for loading and was clearly an incident of its interstate shipment.

Among the authorities cited by the Court in the *Carson* case is the famous case of *Champlain Realty Company* v. *Brattleboro*, 260 U. S. 366, where logs were floated down river from one state to another and were detained at one point due to high water. It was held the interruption was only to promote the safe or convenient transit and did not break the continuity of the interstate journey. *Kelley* v. *Rhoads*, 188 U. S. 1. Another leading case is *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U. S. 469. There, logs were floated down river to Lake Superior where they were held pending their shipment by vessel into Michigan. Again this Court held the delay was incident to the interstate movement and that the movement was continuous. In its decision the Court made one remark of particular interest in our case. In speaking of the floating of the logs down the stream by the owner, it said, page 475:

> "Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the *Champlain Company* case."

In the case at bar the oil has been delivered to a common carrier for delivery in another state. Thus, the Court distinguishes the facts of our case as a clearer case of continuous interstate movement than the *Champlain* or *Hughes Brothers* cases.

There are numerous cases of stoppage in transit by pipe line companies where interstate commerce has been held not to be affected. In *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265, where the oil was stored in tanks at the terminus of the gathering system prior to pumping it through the trunk lines, the language of the court has already been quoted in this brief under our discussion of local bills of lading and local charges. The storage was held only incidental to the movement since it was only what was necessary and convenient in the shipment of the oil. In *State, ex rel. Hirschi* v. *Empire Oil & Refining Co.,* 171 Okl. 138, 42 P. (2d) 127, the company was engaged in transporting oil from points in Oklahoma to points outside the state. But it had storage tanks in Logan County, Oklahoma, where the oil was stored until sufficient oil of the same grade and substance was accumulated to make a batch for shipment. The county sought to assess a tax on the oil in storage on January 1, but the court sustained the defendant's contention that the oil was on *bona fide* consignment and was destined for transportation outside the state, and was, therefore, in interstate commerce. In *Clark* v. *Atlantic Pipe Line Co.,* 134 S. W. (2d) 322, the essential facts of which have been set out heretofore under our discussion of bills of lading, the court used the following language in setting aside the state's contention that the delay in transit and the storage in tanks at the terminals pending the arrival of ships broke the continuity of movement, page 327:

"The delays in transit and storage at the terminal

wharves were only incidental to the customary and essential method of transportation of oil by pipe line and did not break the 'continuity of transit' or affect the interstate character of the shipments."

The facts in this *Atlantic Pipe Line* case are identical to those in our case at bar, except that the transfer of oil is made to ships rather than to railroad cars. Surely that distinction is not material.

The following pipe line cases also support the view that stoppage in transit does not interrupt the interstate journey. *West Virginia Pipe Line Company* v. *State*, 120 S. E. 759; *Cumberland Pipe Line Company* v. *Sheriff of Estell County*, (Ky.) 79 S. W. (2d) 366.

See also, *Railroad Commission* v. *Worthington*, 225 U. S. 101; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498; *Railroad Commission* v. *Texas Pacific Railway Co.*, 229 U. S. 336.

The case of *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co.*, 275 U. S. 257, can be readily distinguished from the case at bar. In that case the oil company maintained large storage facilities at two Florida ports where it received and took title to fuel oil imported from Mexico and to gasoline, refined oil and lubricating oil from Louisiana. These storage facilities served as source of supply for the company's 123 bulk stations located throughout the state, and a sufficient supply was kept in storage to supply the company's need for from 6 to 12 weeks. It was known at the time of shipment that the ultimate destination of the oil was not the storage facilities, but to quote from the language of the court, page 265:

"At the time the shipment of the fuel oil is made from the point or origin, plaintiff cannot say where

any particular cargo * * * will go after it has been pumped into the storage tanks, to whom it will go, or when it will be shipped * * * the only destinations which can be given are Port Tampa and Jacksonville, respectively."

The court, in holding that the shipment from the storage depots and bulk plants was intrastate commerce, based its decision on the fact that the facilities in the way in which they were maintained were not a necessary part of the movement of the products, but were a convenience maintained by the oil company for the operation of its distribution system. Mr. Chief Justice TAFT wrote, page 296:

"The important controlling fact in the present controversy and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations. * * * There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. * * * There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages. * * * Everything that is done after the oil is deposited in the storage tanks * * * is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

Thus the court distinguishes that case for us from the facts of the case at bar.

Three additional cases might be mentioned in which state taxes were held valid because the courts found that stoppage in transit had broken continuity and therefore that interstate commerce had not commenced at the time of the

incidence of the tax. *Federal Compress and Warehouse Co.* v. *E. R. McLean, Sheriff*, 291 U. S. 17; *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, and *Parker* v. *Brown*, 317 U. S. 341. In the *Federal Compress* case Mississippi was levying an excise tax on the business of warehousing and compressing cotton. The Compress Company sought to avoid the incidence of the tax on the grounds of interstate commerce since the cotton was shipped into its warehouse from various points in the state and after compressing was again shipped, this time out of the state. The tax was not on transporting but on storing and processing, and the storing and processing, this Court held, broke the shipment of the cotton. Here there was definitely something more than a mere stoppage in transit which was necessary and incidental to the transportation as in the case at bar. The *Chassaniol* case is very similar in its facts to the *Federal Compress* case and the court followed that case in rendering a decision. The tax was a local occupation tax on the business of buying and selling cotton. Again there was transportation both before and after the operation on which the tax was levied. But the processing of the cotton and dealing in it on the open market was held to be separate and distinct from the shipment. In *Parker* v. *Brown*, the question was whether or not the marketing of raisins by the grower was interstate commerce, and it was conceded the raisins were eventually shipped out of the state. But it was shown that the packers, to whom the grower sold the raisins, processed and packaged them before shipment. The court held that this was manufacture and was not interstate commerce. These three cases must all be limited strictly to the factual situations there involved. As Mr. Justice FRANKFURTER stated in *Freeman* v. *Hewit*, 329 U. S. 249, 252, each "must be read in the setting of the particular

cases and as the product of preoccupation with their special facts." They cannot be construed broadly. In fact, in *Anderson, Clayton & Co.* v. *Wichita Valley Ry. Co., et al.*, 15 Fed. Supp. 475, the factual situation was almost identical to the *Federal Compress* case, but the question of interstate commerce involved the initial transporting rather than the intermediate processing, and the court held this initial transporting to be part of the continuous interstate commerce. The court distinguished the *Federal Compress* case and the *Chassaniol* case. These cases clearly cannot be applied to the facts in the instant case. In those cases the tax was on some operation other than transporting and it was such an operation that the courts felt it could not be tied into the transportation. Here this court does not even have to consider this problem as the operation on which the tax falls in this case is admittedly transportation.

The Mississippi Supreme Court in its opinion in this case has conceded that there is no appreciable stoppage of the oil in transit. In its opinion 35 So. (2d) 73, 79, (Tr.53) the court stated:

> "It may be also conceded for the purpose of this decision, but without admitting that the pipe line company is engaged in interstate commerce, that there is no appreciable interruption at the railroad shipping point in the continuity of the transportation of the oil from the tanks on the producing oil leases to its out of state destinations."

3. *The essential character of the appellant's activity makes it a part of interstate commerce.*

Once it has been established that certain goods are moved across a state line and that there is continuity between that movement and a prior or subsequent movement entirely within a state, the only other consideration which

the courts have given in determining whether the movement from point to point within the state is part of interstate commerce is the question of the essential character of that movement.

It is a well settled doctrine that the essential character of the shipment and not merely the form of contract or method of billing determines the shipment to be interstate or intrastate commerce. The principle seems to be clearly established. *Railroad Commission* v. *Worthington*, 225 U. S. 101; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Texas and N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346. Counsel for appellee in the courts below relied strongly upon the case of *Superior Oil Company* v. *State of Mississippi*, 280 U. S. 390, but that case is simply a good example of the triumph of substance over form. There the court ignores the terms of a contract by which the parties had sought to put themselves in interstate commerce and looks to the facts. These facts show (*1*) transportation within the state, (*2*) a sale, (*3*) transportation by the buyer beyond the state. On these facts the court held that the sale was taxable. But that is only a reassertion of the well established doctrine of taxability of local sales as distinguished from subsequent transportation out of the state.

In the case at bar we have the essential character of the operation clearly established as interstate commerce by:

a. Delivery of the oil to a common carrier, and

b. Intent clearly established by all attendant circumstances that the oil is to move by common carrier out of the state.

a. The oil is committed to a common carrier for transportation out of state when it is turned over to the appellant:

In the present case the appellant never undertakes to move oil except when a tender of shipment has first been made by the owner thereof. This tender shows the quantity of oil to be moved, its destination beyond the state, routes and other necessary information. Being a common carrier the appellant is then obligated to take the oil as soon as it has space available. The oil is pumped from lease tanks into the appellant's lines and once there said oil is committed to complete its journey to the destination named in the tender of shipment, always in this case outside the State of Mississippi. When the shipper parts with the possession of the oil and turns it over to appellant at the lease tanks, the oil is committed to move in interstate commerce to its out of state destination and by way of the routes previously designated on the tender of shipment. It is thereafter out of the control of the shipper except for the power reserved to the owner on all interstate shipments by common carrier to change the destination or routing in transit. This right of the owner to change his mind after the shipment has been committed to a common carrier does not change the essential character of the shipment. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U .S. 469.

The appellee concedes the essential character of the shipments to be interstate commerce where the appellant gathers the oil as in the instant case and then delivers said oil to its own trunk pipe lines. Surely these essential characteristics are not lost because no trunk pipe line has been built and the oil must instead be delivered to a railroad for shipment out of the state. As has been seen in the discus-

sion of the question of "continuity," the fact that all the operations of a particular carrier are completed in one state does not prevent it from being engaged in interstate commerce. Nor does the fact that the mode of transportation may be changed destroy the essential character of an interstate shipment.

The importance in determining interstate commerce which is attached to the mere fact of commitment of goods to a common carrier is shown by a long line of authority. Mr. Justice HOLMES in *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, 395, said:

> "if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana, the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce,"

indicating that in that event the terms of the contract would have been respected. The Supreme Court of California voiced this idea in *Richfield Oil Corp.* v. *State Board of Equalization*, 27 Cal. (2d) 150, 163 P. (2d) 1, 3, when it said a different result might have followed if the oil had been delivered to a common carrier:

> "for then it would have been placed in the hands of an instrumentality whose sole purpose is to export goods, thus indelibly characterizing the process as a part of exportation."

The Supreme Court of the United States in its review of this *Richfield* case, *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, quoted this language of the state court, and while they decided the case under the Import-Export Clause, the following language of Mr. Justice DOUGLAS is just as applicable under the Commerce Clause

to show the point of commencement of transportation, 329 U. S. 82-83:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. * * * It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain."

In our case we have the best evidence. The oil has been placed in the hands of a common carrier whose sole purpose is to transport goods to an out of state destination, thus indelibly characterizing the process as a part of interstate commerce. The stream of commerce has by this commitment been set in motion.

This rule as to the commencement of interstate commerce is stated in unmistakable terms in 11 American Jurisprudence, Commerce, Par. 70:

> "The beginning of the transit which constitutes interstate commerce is the point of time that an article is started on its ultimate passage. This has been said to be when the articles have been delivered or tendered to a common carrier for transportation from the state or for transportation to another carrier for export though on a local bill of lading."

See also, *Texas and N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, and *A. G. Spaulding Bros.* v. *Edwards*, 262 U. S. 66.

A situation closely analogous to the common carrier situation exists where goods are otherwise committed to a conveyance system so that short of a complete change in

plan by those in charge the goods will go into interstate commerce. In *Jersey Central Power and Light Company* v. *Federal Power Commission,* 319 U. S. 61, a case relied on by counsel for appellee in the courts below, the question was whether or not Jersey Central was engaged in interstate commerce so as to be subject to regulation by the Federal Power Commission. Its facilities and operations were all in New Jersey but its lines were connected with the lines of another company, also in New Jersey, which in turn had a connection with a company operating in New York. Power was not regularly sold from one to the other of these companies, but the connections were maintained on a standby basis to be used in an emergency or in case of excess of power on the part of one of the companies. Yet Jersey Central was held in that case to be engaged in interstate commerce. The mere fact that power might cross the state line, that the necessary conduit existed, was sufficient. And the fact that there was a sale before the state line was reached was held not important. The same decision was reached in *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F. (2d) 953, where the court explained and restricted the decision in the *Superior Oil* case to the particular facts there involved.

b. Intent is present when the oil is turned over to the appellant to ship it out of Mississippi:

The essential character of the shipment is based largely on the intent of the parties, and intent while not in itself conclusive, has come to be one of the touch-stones by which interstate commerce is determined. In the case of *Texas* v. *Anderson, Clayton and Co.,* 92 F. (2d) 104, 107, the court said:

> "It is well settled that in determining whether a particular movement of freight is interstate or intra-

state or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment."

There can be no doubt as to the intent in this case. As has already been pointed out, the tenders of shipment given appellant all show a destination outside the state. All the movements of oil handled by the appellant in the case at bar are intended for, and in fact arrive at, points outside the State of Mississipi. None of the parties involved ever have any other intention or thought. The fact of commitment to a common carrier is strong evidence of that intent and the weight attached to such commitment has already been pointed out.

The rule as to the importance of the essential character and the intent is illustrated and applied to pipe lines in the recent case of *Interstate Natural Gas Co., Inc.*, v. *Federal Power Commission*, 331 U. S. 682, decided by this Court on June 16, 1947. In that case gas produced from the company's wells flows into its field gathering lines, then into trunk lines and then to compressor stations where it is sold to other companies. These companies increase the pressure of the gas and then move it out of the state. The question was whether or not the sales are part of interstate commerce so as to be subject to the regulation of the Federal Power Commission. Mr. Chief Justice VINSON in his opinion deciding that the sales are part of interstate commerce held as follows, page 685:

"The entire movement of the gas from the wells to the purchasing companies through the compressor pumps and across the state lines is a continuous process without interruption for storage, processing or for any other purpose."

On page 687:

> "Under the circumstances described by the Commission, it is clear that the sales in question were quite as much in interestate commerce as they would have been had the pipes of the petitioner crossed the state line before reaching the points of sale."

On page 689:

> "Long before the gas reaches the compressor pumps it has been committed to its interstate journey which follows without interruption or deviation. Under such circumstances, the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin."

See also, *United States* v. *Erie Railroad Co.*, 280 U. S. 98; *Railroad Commission* v. *Worthington*, 225 U. S. 101; *United States* v. *Union Stockyard and Transit Company*, 226 U. S. 286; *Baltimore and O. S. W. R. Co.* v. *Settle*, 260 U. S. 166.

In connection with the question of intent two additional cases on which counsel for appellee relied in the courts below should be mentioned. *New York, ex rel. Pennsylvania R. Co.*, v. *Knight*, 192 U. S. 21, was a case in which an interstate railroad furnished its passengers with taxicab service to and from its terminus. This Court held, page 28, that

> "cab service is an independent local service, preliminary or subsequent to any interstate transportation."

But Mr. Justice BREWER in the opinion, page 26, pointed out that the

> "party receiving it [the service] owes no legal duty of crossing the state line."

Thus the opinion turned on the fact that people and not goods were being transported; that people have a will of their own and are not committed to any course of action

until they finally board the vehicle for actual interstate movement. This distinction was made the following year in *Swift and Co.* v. *United States*, 196 U. S. 375, where the Court distinguished the *Knight* case, saying the transportation of persons was different from "cartage for the delivery of meats sold to dealers * * * throughout the states." Such cartage was there held to be a "part of the contemplated transit, cartage for delivery of the goods," and not an "independent matter." The *Knight* case was also explained and the distinction made in the *Swift* case was cited in *Stafford* v. *Wallace*, 258 U. S. 495. The case was also distinguished in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90. But the distinction between persons and goods and the attitude of this Court toward the two types of transportation is even more clearly shown in another case cited below by counsel for appellee, the very recent case of *United States* v. *Yellow Cab Company, et al.*, 332 U. S. 218 (June 23, 1947). This case while following the *Knight* case in holding cab service to or from a railroad station at the beginning or end of an interstate trip to be intrastate commerce, carefully distinguished the transportation of persons from the transportation of goods. Mr. Justice MURPHY in the opinion of the Court used the following language, page 231:

> "In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station * * *. But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. * * * Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a

particular kind of interstate commerce by its own practical considerations."

The court then goes on to explain the freedom of choice which an individual may exercise in choosing his mode of transportation to and from the station, including "his own two legs." This freedom of choice destroys the essential continuity between the cab service and the interstate movement. But no such freedom of choice exists in the case of a barrel of oil and the rule for goods and chattels, as hinted in the *Knight* case itself and as set out in so many words in the *Yellow Cab* case and as ruled in the *Swift and Co.* case, is different from that for persons. Once a barrel of oil has been committed to a common carrier for shipment to an out of state destination, the barrel of oil cannot change its mind and all authorities are agreed that interstate commerce has commenced. The taxicab cases may also be distinguished from the case at bar in that the taxicab companys are not common carriers and their business is primarily local whereas in our case the appellant is a common carrier in the same sense as is the railroad and it is moving no oil to local destinations.

Before leaving the question of whether the operations of this appellant are interstate commerce, we should like to distinguish two cases cited by the attorney for appellee in the state courts which we have not touched on in our brief to this point and also to refute an argument used by said attorney in seeking to distinguish some of the cases cited by us in this brief.

The widely cited *Department of Treasury of Indiana v. Wood Preserving Corporation*, 313 U. S. 62, was cited below by atterney for appellee. The Indiana gross receipts tax in that case was applied to the proceeds of the sale of

railroad ties which were immediately thereafter shipped out of the state. We have no dispute with this case in which the gross receipts tax was applied not to the transportation but to a sale prior to transportation out of the state. We fail to see its applicability to our case. The attorney for the appellee used another case involving this Indiana gross receipts tax in his brief below, *Department of Treasury of Indiana* v. *Ingram-Richardson Manufacturing Co. of Indiana*, 313 U. S. 252. The receipts there taxed were derived from services rendered in the enameling of metal fixtures, but included also the charge for trucking the parts into the state for processing and out again afterwards. The court held that the major service was the purely intrastate operation of enameling. Mr. Chief Justice HUGHES in the opinion said, at page 255:

> "The transportation of the metal parts to and from Indiana were but incident to that intrastate business."

And it was on that basis that the tax was allowed to fall on that part of the service. Even then the court went on to suggest that if the company had made a separation of the charge for transportation services and had claimed an exemption therefor that they could have sustained their claim.

In the courts below, counsel for appellee sought to distinguish a number of the cases cited in this brief on the grounds that they involved the question of ad valorem taxation and were, therefore, not applicable to an excise tax case. This view of these cases misses the fact that they have not been cited to establish the validity or invalidity of the excise tax but have been cited to establish the existence of interstate commerce. The question of whether interstate or intrastate commerce was involved had to be decided in all of those cases as a preliminary to a decision on

the validity of the tax. The only contention of the counsel for appellee in the courts below was that the facts in our case constituted intrastate commerce and it was on that basis that the tax was sustained. Thus, the ad valorem tax cases are cited as authorities for the proposition that the activities of this appellant involved herein constitute interstate commerce. The basic principle of the exemption—interstate commerce—is identical in the case of property taxes and excise taxes although the power of the states to levy property taxes and to levy excise taxes on gross receipts from interstate commerce differs by reason of the more direct burden of the latter type of tax on the commerce and its susceptibility to duplication in the several taxing jurisdictions affecting the commerce.

B.

The State of Mississippi Does Not Have the Authority to Levy and Collect a Tax on the Privilege of Carrying on Interstate Commerce Measured by the Gross Receipts Derived by the Appellant, a Common Carrier, from said Interstate Commerce.

Once we have established the proposition that those activities of this appellant which are involved in this lawsuit are in interstate commerce and are a part thereof, we come to the second point for consideration in the determination of the validity of the tax—does a state have the power without conflicting with Article I, Section 8, Clause 3, of the Federal Constitution to levy an unapportioned privilege tax based on the gross receipts derived from interstate commerce?

As heretofore stated appellee has never made this claim in the courts below, and has based the right to tax appellant's gross receipts on the theory that they were derived from intrastate commerce. If appellee had considered

the Mississippi statute as levying a tax on interstate commerce, he would not have singled out the particular operations of appellant on which he has here levied a tax. These particular operations were subjected to tax because they were considered as intrastate commerce. Similarly the Supreme Court of Mississippi in its decision in this case held the tax valid on the grounds that appellant was engaged in intrastate commerce. Appellant now suggests that this Honorable Court hold the Mississippi courts to have erred in not holding the operations involved herein to be interstate commerce and the Mississippi statute as construed and applied to be void and of no effect by reason of being repugnant to the Commerce Clause of the Constitution of the United States.

In support of the unconstitutionality of the Mississippi statute as applied herein we shall seek to establish the following propositions:

1. The State of Mississippi does not have the power under the Commerce Clause of the Constitution of the United States to levy a privilege tax based on the gross receipts derived from interstate commerce in addition to state taxes on net income, proberty and corporate franchise.
2. Even if the state has the power in general to levy a privilege tax based on the gross receipts derived from interstate commerce, the tax in this case is a burden on interstate commerce and unconstitutional because
   a. It is not apportioned, and
   b. It is discriminatory.

1. ***The State is barred by the Commerce Clause of the Constitution of the United States from levying a privilege tax based on the gross receipts derived from interstate commerce.***

Article I, Section 8, Clause 3, of the Constitution of the United States does not specifically and directly prohibit anything. It provides simply:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *."

The process of arriving at a definite and reasonable application of this clause, generally known and identified in this brief as the Commerce Clause, so as to relieve the states from undue restriction in the regulation of intrastate commerce while preserving to the Federal Government its constitutional power to regulate commerce among the states has given rise to numerous court decisions. In the course of these voluminous decisions bearing on the broad field of the powers of the federal and state governments in the regulation of interstate and intrastate commerce, some definite and well established principles have evolved.

Mr. Chief Justice MARSHALL in the decision of *Gibbons* v. *Ogden*, 22 U. S. 1, as early as 1824 established the principle that the power to regulate interstate commerce is completely and exclusively vested in the Federal Government. This general pronouncement has been the guiding star of our courts for over one hundred years and in the recent case of *Freeman* v. *Hewit*, 329 U. S. 249, Mr. Justice FRANKFURTER, writing for the majority of this Court, said, at page 252:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact

laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the states. *Southern P. Co.* v. *Arizona*, 325 U. S. 761, * * *; *Morgan* v. *Virginia*, 328 U. S. 373, * * *. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the nation's history. This limitation on state power, as the *Morgan* case so well illustrates, does not merely forbid a state to single out interstate commerce for hostile action. A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to a similar encumbrance."

Another important pronouncement by this Court is recognized as axiomatic. In 1887 in *Philadelphia & S. Mail S. S. Co.* v. *Pa.*, 122 U. S. 326, 336, this Court said:

"But taxing is one of the forms of regulation. It is one of the principal forms."

Again in *Freeman* v. *Hewit*, Mr. Justice FRANKFURTER indicates how the present Court feels about this doctrine, 329 U. S. 252-253:

"These principles of limitation on state power apply to all state policy no matter what state interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a state under the taxing power rather than under manifestations of police power in the conventional sense."

If we put these two doctrines together, that Congress has exclusive jurisdiction of interstate commerce and that taxation amounts to regulation, all state taxation of inter-

state commerce would be barred *ab initio*. The courts have seen fit, however, to soften this rule. Let us return to the language of Mr. Justice FRANKFURTER in *Freeman* v. *Hewit*, at page 253:

> "But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of state action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial."

The courts have sought to maintain a balance between the need of the states to finance the cost of their governmental services on the one hand and the requirement of the Constitution that states not interfere with interstate commerce on the other hand.

One of the doctrines that has grown out of this searching by the courts is the so-called "share the burden" theory. The leading case on this theory is *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33. There the tax in question was a New York City sales tax of 2%, which had in that case been levied on the proceeds of the sale in the city of coal which had been brought into the city from outside the State of New York. The Court upheld the tax on the theory stated at page 49, that:

> "interstate commerce admittedly must bear its fair share of state tax burden * * *."

But even in enunciating this theory the Court said on page 48:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate

against the commerce or *impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings*, or levy an exaction on merchandise in the course of its interstate journey." (Emphasis supplied.)

While discussing the "share the burden" concept, we should like to call the Court's attention to the fact that the appellant herein in paying the State of Mississippi a very sizable income tax on its net taxable income in the state, that it is paying ad valorem taxes on all its property in the state, that it is paying a franchise tax based on capital and surplus employed in Mississippi, and that it is paying all the other numerous taxes direct and indirect which form a part of the costs of doing business in that state. But in connection with the "share the burden" theory and its limitations let us return again to the language of Mr. Justice FRANKFURTER in *Freeman* v. *Hewit*. At 329 U. S. 253, he writes:

> "State taxation falling on interstate commerce * * *, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a state a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a state's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominate power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of

aspects of such commerce. The task of scrutinizing is a task of drawing lines."

We now come to the task of scrutinizing the lines that this Court has drawn. That scrutiny reveals that this Court has never permitted a state tax levied directly upon gross receipts from the transportation of goods, persons or messages in interstate or foreign commerce or levied directly on the goods while in transit or exacted as a fee for the privilege of engaging in such traffic. The rule was well stated in the opinion of this Court in *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments*, 280 U. S. 338; 346, where the court said:

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

We have already seen in *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, that in drawing its lines the court has permitted a tax on the sale of property at the conclusion of an interstate journey. We have seen in *Department of Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U. S. 62, and *Superior Oil Co.* v. *State of Mississippi*, 280 U. S. 390, that a sales tax is also permitted on the proceeds of a sale of property immediately preceding the interstate shipment of that property, where the vendee makes the interstate shipment. The case of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, presents the other side of the picture. There the Indiana gross receipts tax was applied to gross sales

of an Indiana manufacturing company although the company shipped its products out of the state and the court held the tax invalid as a burden on interstate commerce. Still another case involving a sales tax is that of *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, in which this Court held invalid a state tax measured by gross receipts from the business of marketing fruit shipped in interstate commerce from the state of production to places in other states where the sale and deliveries were made. We have already noted in *Federal Compress and W. Co.* v. *McLean*, 291 U. S. 17, and *Parker* v. *Brown*, 317 U. S. 341, that a state tax is permissible on the privilege of processing personal property temporarily withdrawn from transit; and in *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, that a tax is allowed on the business of buying and selling property immediately preceding an interstate shipment thereof. We have already mentioned and quoted authority to the effect that personal property is subject to state ad valorem taxation immediately before (*Coe* v. *Errol*, 116 U. S. 517) and immediately after (*Woodruff* v. *Parham*, 75 U. S. 123; *Atlantic Coast Line R. Co.* v. *Standard Oil Company of Kentucky*, 275 U. S. 257) its interstate shipment and even between two shipments when it has been temporarily withdrawn from transportation as in *Minnesota* v. *Blasius*, 290 U. S. 1. But state ad valorem taxation is never permitted on goods in interstate commerce, even though there may be a temporary interruption as in *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, and *Carson Petroleum Company* v. *Vial*, 279 U. S. 95, in the actual movement of the property. State taxes have been sustained too on the storage and use of personal property immediately following an interstate shipment as in *Henneford* v. *Silas Mason*, 300 U. S. 577, even when the property is to be used in interstate commerce, *Southern Pa-*

cific v. *Gallagher*, 306 U. S. 167. This Court has permitted state taxation of net income from interstate commerce on that part of the net income fairly attributable to the taxing state as in *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113. The Court has permitted state franchise taxes in lieu of ad valorem taxes on property employed directly in interstate commerce as in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688; and capital stock taxes in lieu of ad valorem taxes as in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18. The Court has also permitted state franchise taxes on interstate carriers where the carrier had qualified to do intrastate business and the franchise tax is a license for the exercise of its corporate powers in such business, whether or not the intrastate business is actually carried on (*Interstate Natural Gas Co.* v. *Stone*, 308 U. S. 522). Then in the recent case of *Memphis Natural Gas Co.* v. *Stone*, 385 U. S. 80, this Court upheld a franchise tax on an interstate carrier which had not qualified to carry on and was not carrying on intrastate business but which was only engaging in such intrastate activities as were necessary to its interstate business. The Court based its opinion on the finding of the Mississippi Supreme Court that the tax was not on the privilege of doing business but was "an exaction * * * as a recompense for * * * protection of * * * the local activities." This Court concluded, page 96:

> "This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In so far as the case of *Ozark Pipe Line* v. *Monier*, 266 U. S. 555, had held that the state activities which were incidental to interstate commerce could not be subjected to

a license tax, the Court in the *Memphis Natural* case said, "we disagree," but it sought to distinguish the taxes on grounds of a different purpose, the *Ozark* case admittedly involving a tax for the privilege of doing business. In the *Memphis Natural* case the majority opinion very carefully points out, page 93:

> "that the Mississippi statute here involved is not upon the privilege of doing an interstate business."

And again the majority stated, page 93:

> "This tax is not an unapportioned tax on gross receipts from the commerce itself."

Thus the *Memphis Natural* case can be readily distinguished from the case at bar for in our case the Supreme Court of Mississippi in its opinion repeatedly characterized the tax as appears on page 45 of the transcript of record, 35 So. (2d) 74, as a:

> "privilege tax for operating these pipe line systems for transporting the oil from one point to another in this state."

The tax is clearly based on the gross receipts derived from carrying on that business. Thus the tax in this case is exactly what the court said the tax in the *Memphis Natural* case was not when it held it valid, a tax on the privilege of doing interstate business, based on the gross receipts from that business.

In previous years this Court has uniformly held that the states could not levy license taxes, even at a flat fee, for the privilege of engaging in interstate commerce. The Court decided that such a tax could not be levied for the transportation of persons in *Crandall v. Nevada*, 73 U. S. (6 Wall.) 35, in 1868.

In 1873 in *Philadelphia & Reading R. Co.* v. *Pennsylvania (case of the State Freight Tax)*, 82 U. S. (15 Wall.) 232, this Court was confronted with the question of whether or not the State of Pennsylvania could levy a tax on carriers within the state based on the amount and type of freight carried by them, including their interstate freight. The Court held that this tax resulted in the very type of regulation of interstate commerce which the framers of the Constitution had in mind when they conferred that regulation upon the Congress. The Court said at page 276:

> "The Legislature of Pennsylvania has, in effect, declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of $5. Such an imposition whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines * * *. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade * * * The state may tax its internal commerce; but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by includ-

ing in its provisions subjects within the domain of the state."

Applying a portion of the above reasoning to the present case, we might point out that while some members of this Court may feel that the present Mississippi tax of 2% is not large enough to be burdensome or to interfere with the interstate movement of this oil, yet it is not the size of the present tax but the principle involved on which the Court must base its opinion. If the state has the power to levy a tax of 2% on appellant's gross receipts, it has the power to levy a tax of 20%, or even of 50%, and it requires no stretch of the imagination to recognize that t atter rate would drive the appellant and all other pipe line companies out of this type of operations and so would undeniably be an interference with this commerce.

In 1888 the privilege tax rule was applied to a telegraph company for the privilege of sending interstate messages, *Leloup* v. *Mobile*, 127 U. S. 640; and in 1891 the court held that an express company could not be charged a state license for the privilege of transportating property in interstate commerce, *Crutcher* v. *Kentucky*, 141 U. S. 47. In *Sprout* v. *South Bend*, 277 U. S. 163, (1928) the Court again held that a flat license tax could not be levied by a state for the privilege of transporting persons in interstate commerce.

In *State Tax Commission* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41, (1931) the State of Mississippi under its privilege tax code sought to levy, Title 38, Paragraph 9606 of Mississippi Code, 1942, Annotated:

> "Upon each person engaging or continuing in this state in the business of operating a pipe line, or transporting in or through this state oil * * * a tax,"

at a fixed amount depending on size of pipe and length of

line. This tax, as the tax in the case at bar, was levied for the privilege of operating an oil pipe line. The main difference between the tax there and in the present case was in its measurement, there at a flat rate, here varying according to amount of business done. But in that case this Court held the tax invalid when applied to interstate commerce, even though it was not measured by gross receipts. The State of Mississippi is seeking through the tax in this case to exact from an interstate pipe line a levy for the privilege of conducting an interstate business which was denied to it by this Court in the above case by changing the computation from a fee, based on mileage to a graduated fee based on receipts, when in fact the latter computation is a more direct burden on commerce than the first.

On the other hand even taxes based on gross receipts derived from interstate commerce have been permitted where they are in lieu of ad valorem taxes on the property employed in that commerce as in *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 227, this Court by a 5 to 4 decision held an "excise tax for the privilege of exercising its franchise" valid although based upon gross receipts from interstate commerce. In reaching this decision the court was very careful not to hold that gross receipts were taxable. In the decision the majority refer to *Philadelphia & So. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, which it perhaps the leading case on the doctrine that states cannot tax gross receipts from interstate commerce, and which is discussed in more details below, with the statement, page 230, that the *Philadelphia* case "in no way conflicts with this decision." They go on to say:

"We do not question the correctness of that deci-

sion, nor do the views we hold in this case in any way qualify or impair them."

Mr Justice HOLMES in *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, in seeking to explain the decision in the *Maine* v. *Grand Trunk* case perhaps comes closest to stating what the Court actually held. He says that the court was apparently looking at the intent of the state and the state seemed to be seeking a measure of the going concern value of the corporation on which to base a tax for the privilege of exercising its franchise. The state chose gross receipts as a measure of going concern value and based the tax on that, without any intent to tax the gross receipts themselves. This "going concern" tax and the local property tax were in lieu of all other taxes and the court decided to go along with the state on its method. In any event, the case is bad law and probably the only reason it has not been specifically overruled is that the court so carefully stated that its opinion was not inconsistent with *Philadelphia & So. M. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326. The *Grand Trunk* case is authority for nothing except the particular set of facts and the particular tax there involved. State franchise taxes measured by gross receipts have also been permitted when the taxpayer was not engaged in interstate commerce but when his gross receipts were derived from the rental of facilities used in interstate commerce as in *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431.

But with all this permitted state taxation of interstate commerce and the incidents thereof, this Court from the decision in *Philadelphia & So. M. S. S. Co.* v. *Pennsylvania*, (1887) right down to the present time has never permitted, with the possible exception of the *Maine* v. *Grand Trunk* case, the direct taxation of the interstate commerce itself by the exaction of a privilege tax, measured by gross re-

ceipts on the conduct of such commerce, in addition to the taxation of the property used in the commerce. As has been already stated, this appellant is paying the State of Mississippi an ad valorem tax on all its property used in the state, even though that property is being used solely in interstate commerce. It is paying the State of Mississippi an income tax on that portion of its net income derived from activities in the state, even though those activities are interstate commerce. It is paying the State of Mississippi a franchise tax for the right to do local business within the state although no local business is being transacted. All of these taxes are permitted under the Commerce Clause as we have seen. But this additional tax, which, if the first premise of this brief is correct, and accepting the Mississippi Supreme Court's interpretation of the state statute, is a privilege tax on the right to conduct interstate business within the state, based on the gross receipts derived from that business, and is the very type of tax which this Court has again and again condemned.

In 1887 in *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, this Court was confronted, in its own words, with the question:

> "whether a state can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different states and to and from foreign countries."

After reasoning that transportation is commerce and that taxation of transportation is regulation of commerce, the unanimous Court continues at page 336:

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed

by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless tax the fares and freight received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The Court continues on page 338:

"Of what use would it be to the ship owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the state on such receipts must be in conflict with it."

Here in this language of the Court we see the basic and fundamental reason this Court has drawn the line and refused to allow state taxation of the gross receipts of interstate commerce. Unlike property taxes and income taxes and taxes on the transfer of title to property, gross receipts taxes are so closely linked to the transportation itself that a tax of one is actually a tax of the other, and so a tax on gross receipts is tantamount to a tax on the transportation itself and is strictly within the domain of Congress. (As

witness the Federal Pipe Line Transportation Tax, 26 U. S. C. A., paragraph 3460.) In concluding that opinion in the *Philadelphia & S. M. S. S. Co.* case, Mr. Justice BRADLEY writing for the unanimous Court states, page 345:

> "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government. This is a principle so often announced by the courts, and especially by this court; that it may be received as an axiom of our constitutional jurisprudence."

Then on page 346 he states:

> "It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the state at all, it has no limit but the discretion of the state, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other states interested in it; and if those states, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs."

Mr. Justice BRADLEY then quotes Mr. Chief Justice MARSHALL'S opinion in *Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 419, to the effect that prior to the adoption of our present Federal Constitution and system of government just such confusion did exist because of state taxation of interstate commerce, and that confusion was probably the leading factor in precipitating the Constitutional Convention and the adoption of the Constitution.

In 1888, the year following the *Philadelphia & So. M. S. S. Co.* case, this Court decided another case dealing with gross receipt taxes. *Ratterman* v. *Western Union*, 127 U. S. 411, involved the question of a tax by Ohio on the receipts of a telegraph company. The Court indicated it considered the law well settled when it stated, page 424:

> "Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that so far as this tax was levied upon receipts properly appurtenant to interstate commerce that it was void."

In 1908 we come to another land mark in the law on state taxation of gross receipts derived from interstate commerce, Mr. Justice HOLMES' opinion in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217. In that case the State of Texas sought to impose on railroad corporations "an annual tax for the year 1905, and for each calendar year thereafter, equal to 1 percentum of its gross receipts if such line of railroad lies wholly within the state." The lines of the railroads concerned were wholly within the state as are the lines of appellant which are involved in the case at bar, but, just as in this case, there were connections with railroads running out of the state and a portion of the gross receipts were derived from passengers and freight coming from, or destined to, points without the state. Mr. Justice HOLMES after reviewing the authorities and going at some length into the doctrine as set out in *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379, that states "must be allowed to tax the property, and to tax it at its actual value as a going concern," stated, page 227:

> "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal

to' 1 per cent of gross receipts, and a tax of 1 per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to'."

In *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, (1912) the State of Oklahoma was attempting to levy a "gross revenue tax" on public service corporations apportioned so as to tax the Oklahoma portion of their business. The tax was similar to that in the *Galveston, H. & S. A. R. Co.* case and Mr. Justice HOLMES, again writing the opinion of the Court, dismissed the state's contention that the tax was a property tax and held it invalid as a tax applied to the gross receipts derived in part from interstate commerce.

In 1921 two cases involving the same West Virginia taxing statute were decided by this Court. The tax was not a pure gross receipts tax but similar in its effect since it varied with the volume of business done. In *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, the tax was on the business of transporting petroleum in pipe lines and amounted to 2 cents for each barrel transported. In *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, the tax was on the transportation of gas. In both cases once the issue was settled that the transportation was interstate, there was no hesitation in holding the tax void. In 1924 in *New Jersey Bell*

Tele. Co. v. *Board of Taxes and Assessments*, 280 U. S. 338, this Court held invalid a franchise tax based on properly apportioned gross receipts in spite of the state's contention that the tax was in lieu of all other taxes on the company's intangible property and was for the privilege of using the public domain.

In 1936 the case of *Fisher's Blend Station* v. *Tax Commission of State of Washington*, 297 U. S. 650, according to Mr. Justice STONE who spoke for a unanimous Court, presented, page 651:

> "the question whether a state occupation tax, measured by the gross receipts from radio broadcasting from stations within the state, is an unconstitutional burden on interstate commerce."

After reversing the holding of the State Supreme Court that the gross receipts of a radio broadcasting station were derived from intrastate commerce, this Court said, page 655:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce."

The following year, 1937, saw the introduction of what might be called the "modern era" in the realm of the interpretation of the Commerce Clause and its application to state taxation. In *Puget Sound* v. *Tax Commission*, 302 U. S. 90, the State of Washington levied for the privilege of engaging in business activities within the state a tax equal to ½ of 1% of the gross income of the business. This tax had been applied to the appellant, a stevedoring company whom the Court found to be engaged in interstate and foreign commerce. Mr. Justice CARDOZO spoke for a unanimous Court, when he stated at page 94:

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling."

Mr. Justice CARDOZO did not look for any other reason on which to base this opinion. He did not consider whether this tax would burden commerce by virtue of being duplicated elsewhere. He did not inquire whether it was apportioned. He did not consider the matter pertinent and necessary to a decision in the case. The tax was a privilege tax on gross receipts derived from interstate transportation and for that reason was invalid.

We come now to the year 1946, and the decision in *Freeman* v. *Hewit,* 329 U. S. 249, the language of which we have already quoted at some length in its delineation of our problem. We are ready now to consider its conclusion. The case, like *Adams* v. *Storen,* 304 U. S. 307, involved the Indiana gross receipts tax and again the tax was applied to the gross receipts from a sale of property to a buyer outside the state. The facts therefore are not as strong as in the case at bar where the gross receipts being taxed are derived from the actual transportation of the goods. The reasoning of Mr. Justice FRANKFURTER, however, is just that much more valid in our case. At 329 U. S. 254 he holds it immaterial that the tax affects interstate and intrastate business alike:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of

course a state is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade. * * * But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the state line, while the aim of the Commerce Clause was precisely to prevent states from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied."

After describing some of the taxes which Indiana could exact against the seller, Mr. Justice FRANKFURTER continues, at page 256:

"While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty year has been the ward of the Commerce Clause."

Mr. Justice FRANKFURTER then dismisses the contention that to hold a state tax invalid, duplication of the tax by other states must be shown, with the following language, page 256:

"It is suggested, however, that the validity of a gross sales tax should depend on whether another state has also sought to impose its burden on the transactions. If another state has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only

one state has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a state can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various states at a particular moment. * * * Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a state may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a state from interstate commerce falls not because of a proven increase in the cost of the product. *What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.*" (Emphasis supplied.)

In March, 1947, this Court was again confronted with a gross receipts tax in the twin cases of *Joseph* v. *Carter & Weekes Stevedoring Co.* and *Joseph* v. *John T. Clark & Son*, 330 U. S. 422. The tax there involved was levied by New York City "for the privilege of carrying on * * * any trade, business" and was "equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such" trade or business. The Court followed the *Puget Sound* case in holding that the business of appellees was interstate commerce. Mr. Justice REED, writing the opinion of the Court, then states that the tax is invalid in the following language, page 433:

"Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. * * * Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for

interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company.*"

We come now to, as far as we have been able to ascertain, the last case decided by this Court involving a gross receipts tax, *Central Greyhound Lines v. Mealey*, 92 L. ed. (Adv. Sheets) 1235, decided in June, 1948. That case involved a New York "tax on appellant's gross receipts from transportation between points within the state but over routes that utilize the highways of Pennsylvania and New Jersey." The state sought to levy the tax on the unapportioned receipts of appellant from this transportation. The New York Court of Appeals held that the transportation in question was intrastate commerce and therefore that the tax was valid. Mr. Justice FRANKFURTER, writing the opinion of this Court, reversed the state court, holding that the transportation was interstate and that the unapportioned tax on gross receipts must fall. Mr. Justice FRANKFURTER writes, 92 L. ed. (Adv. Sheets), page 1241:

> "By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' * * * The vice of such a tax is that it lays 'a direct burden upon every transaction in (interstate) commerce by withholding, for the use of the state, a part of every dollar received in such transactions'."

Mr. Justice FRANKFURTER then goes on in his opinion to suggest that if the state authorities should seek to apportion the receipts on some basis such as the mileage within the state and then levy a tax on such apportioned gross receipts that it might be constitutional. The question before the Court was one of an unapportioned tax, so this

case is not authority for sustaining an apportioned gross receipts tax.

Now that we have scrutinized and surveyed and examined the lines drawn by the court in its interpretation of the problem of taxation by the states under the Commerce Clause what conclusions may be drawn? For one thing, we have found that there are almost as many rules as there are cases. This we might have suspected from the language of Mr. Justice FRANKFURTER in *Freeman* v. *Hewit*, 329 U. S. 249, quoted at the start of the argument in this brief. It is remarkable, in view of this fact, that we find such unanimity of opinion on the doctrine that the states cannot levy a tax on gross receipts derived from interstate commerce. This doctrine, practically in this unqualified form, is the law today as emphasized by Mr. Justice CARDOZO in the *Puget Sound* case and as reaffirmed by Mr. Justice REED in the *Carter & Weekes* case. In over 100 years of jurisprudence the only qualification that has been placed on this doctrine is that such a tax may be enacted in lieu of property taxes, *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; and *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379. Outside of that qualification the only cases, out of the great mass of cases on the subject, which have ever questioned or qualified this doctrine are *Philadelphia & Reading R. Co.* v. *Pennsylvania*, 82 U. S. 284, which was emphatically denounced in what became the leading case on this doctrine *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania; Maine* v. *Grand Trunk*, which has been discussed at some length in this brief, and which tried to create a distinction between a tax on gross receipts and a franchise tax measured by gross receipts; and *Central Greyhound Lines* v. *Mealey*, which did not qualify the rule, but indicated that if a gross receipts tax were apportioned it might be approved. On the other hand such

cases as *McGoldrick* v. *Berwind-White* and *Memphis Natural Gas Co.* v. *Stone* in holding other types of tax valid have gone out of their way to state that taxes on gross receipts are invalid or to distinguish the tax involved in their particular case from a gross receipts tax in order to justify it. When we restrict our doctrine to the field of *privilege* taxes measured by gross receipts, we find no qualifications to the court's pronouncement of invalidity. The *Cudahy Packing Co. case* and *Wisconsin & M. R. Co.* case were not privilege taxes, but were gross receipts taxes in lieu of property taxes. The *Grand Trunk* case in its interpretation and explanation by later decisions of this Court if not in origination is also a tax on intangibles or "going concern" value measured by gross receipts and not a privilege tax. No where in the decision of the *Central Greyhound* case is the tax there identified as a privilege tax. If it were so identified the case on its facts could still be distinguished from the case at bar. The tax might be exacted in *Central Greyhound* for the privilege of using the highways. In the case at bar the appellant buys its own right of way and builds and maintains its own transportation medium.

Let us look now at the reasoning and logic back of the lines which have been drawn by the court in its attempt to reconcile the local need for revenue and the "overruling requirement of freedom for the national commerce," *Freeman* v. *Hewit*, 329 U. S. 249. At the risk of oversimplification of the problem, we believe the general principles can be stated very briefly. This Court has repeatedly held that a tax is not void merely because it affects or burdens interstate commerce. A tax is void only if it directly burdens such commerce, or, where the burden is indirect, if it discriminates against or obstructs interstate commerce. To get to the basis for this interpretation by the Court, we must

go back to the writing of the Constitution itself and to the purpose of the Commerce Clause. As Mr. Justice REED put it in *Joseph* v. *Carter & Weekes*, 330 U. S. 422, 426:

> "It is trite to repeat that the want of power in the confederation to regulate commerce was a principal reason for the adoption of the Constitution."

This fact accounted for Mr. Chief Justice MARSHALL's opinion in *Gibbons* v. *Ogden*, 22 U. S. 1, that the Constitution vested exclusive jurisdiction over interstate commerce in Congress. This doctrine which has become axiomatic was well stated by Mr. Justice RUTLEDGE in his concurring opinion in *Freeman* v. *Hewit*, 329 U. S. 249, 263, as follows:

> "I agree that the Commerce Clause 'of its own force' places restrictions upon state power to tax, as well as to regulate, interstate commerce."

As Mr. Justice DOUGLAS put it in *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 75:

> "It is well established that the Commerce Clause is a limitation upon the power of the states, even in absence of action by Congress."

But as we have seen this Court has qualified the broad implications of Mr. Chief Justice MARSHALL's doctrine. It has permitted state taxation and state regulation of interstate commerce as long as the taxation or regulation is not an interference with or a direct burden on interstate commerce. As additional cases have been decided, each on its own facts, the scope of the states' power to tax has been inevitably increased. This Court not wanting to cripple or hamper the states unnecessarily in their search for revenue and feeling that interstate commerce should bear its fair share of the cost of local government has endeavored wherever possible to sustain the state tax. But the Court has continued to invalidate those taxes, to borrow the lan-

guage of Mr. Justice DOUGLAS in *Richfield Oil Corp.* v. *State Board, supra*, page 76:

> "which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it."

This summation of the field closed to state taxation shows the degree to which it has shrunk. Outside of taxes which are discriminatory and would therefore be invalid under the Due Process Clause even if there were no Commerce Clause, there are very few types of tax which the states cannot levy under present jurisprudence. The most important class of taxes which are now considered invalid are taxes for the privilege of conducting interstate commerce, whether based on a flat fee, based on some apportioned formula, or based on gross receipts. The tax in the case at bar is defined by the Supreme Court of Mississippi as a privilege tax for operating a pipe line for the transportation of oil and it is based on the gross receipts from that transportation. Surely no tax the state could impose and no regulation they could promulgate would more completely affect or burden interstate commerce than this tax. It is no wonder this Court has steadfastly held that privilege taxes based on gross receipts from interstate commerce are invalid. In the first place all gross receipt taxes are invalid under existing law. Such taxes are invalid because they place an undue burden on the commerce in that they are so closely associated with the commerce that a tax on gross receipts is actually a tax on the commerce itself. When the gross receipts are derived not from sales, as in *Freeman* v. *Hewit*, 329 U. S. 249, but from the actual transportation services as in the present case, the argument against their taxation is considerably strengthened. In the second place taxes on the privilege of engaging in interstate com-

merce have been uniformly rejected by this Court. When a state requires a tax for the privilege of conducting a business, it has the power of life or death over that business. Unless the business complies, it cannot operate. If the state raises the tax beyond the ability of the business to pay, it may wipe out the business. Such a tax represents regulation in its most virulent form. In this case we have a privilege tax measured by gross receipts. If the Commerce Clause is to continue to have any meaning in the realm of state taxation, unless all this existing jurisprudence is to be thrown overboard, if any type of state taxation is to be held invalid under the Commerce Clause, the present privilege tax on the gross receipts derived from interstate transportation must be invalidated.

2. *Even if the State has the power in general to levy a privilege tax based on the gross receipts derived from interstate commerce, a tax in this case is unconstitutional and a burden on interstate commerce because it is not apportioned and it is discriminatory.*

a. The tax in this case is not apportioned:

The only two cases of this Court in which we have found an indication that state taxes measured by gross receipts from interstate commerce might be sustained are the previously discussed cases of *Maine* v. *Grand Trunk;* 142 U. S. 217, (1891) and the recent case of *Central Greyhound Lines, Inc.* v. *Mealey,* 92 L. ed. (Adv. Sheets) 1235. The former case involving a franchise tax measured by gross receipts has been distinguished by this Court both in the decision itself and in the later decision of *Galveston H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, from a direct tax on the privilege of engaging in interstate commerce measured by gross receipts derived therefrom which is here involved. In the latter case the State of New York was denied the

right to tax the gross receipts from transportation by bus from New York City to Albany, New York, *via* a route of which 57.47% lay within the State of New York and 42.53% lay within the states of New Jersey and Pennsylvania. However, Mr. Justice FRANKFURTER indicated that the tax might be sustained on receipts from transportation apportioned as to mileage within the State of New York. This Court will note that in the instant case no apportionment has been made of the tax sought to be collected by the State of Mississippi on the basis of mileage or any other proper or equitable basis. What the Mississippi statute has done under the interpretation of the Tax Commission and what the Supreme Court of that state has affirmed is a segregation of a continuous interstate movement from producing lease tanks to final destination into two arbitrary segments. One part the transportation from lease tanks to railroad tank cars performed by appellant it has treated as intrastate commerce and subjected the gross receipts therefrom to the full two per cent tax. The remainder of the movement from appellant's loading racks to out of state destination performed by the railroads it has admittedly exempted from the tax entirely even though a part of the mileage transported by said railroad carriers lay within and a part of the transportation services rendered by those carriers was performed within the State of Mississippi. Even if we should admit for the sake of argument that the Mississippi statute might have constitutionally imposed a tax on the mileage proportion of the revenue earned from the complete interstate movement, the statute does not so provide but as interpreted by the Mississippi Supreme Court would levy an arbitrary exaction on the gross receipts of those carriers whose lines begin and end within the state while exempting from tax the Mississippi portion of

movements by other connecting carriers which transport the same shipments from the point of loading within the State of Mississippi to destinations outside the state. Such application of the tax to revenue from portions of interstate transportation by one carrier within the state while exempting revenue from other portions of the same shipments likewise moved by other common carriers within the state, is arbitrary and an unreasonable burden on interstate transportation by the short haul carrier whose lines lie entirely within the State of Mississippi. As Mr. Justice FRANKFURTER aptly stated in the *Central Greyhound Lines* case, 92 L. ed. (Adv. Sheets) 1235, 1239:

> "The kind of confusion to which the *Lehigh Valley* opinion has given rise results from employing a needless fiction—calling commerce local which in fact is interstate—as a manner of stating that a particular exercise of state power is not invalid even though it affects interstate commerce. The difficult task of determining whether a phase of commerce concededly interstate is subject to a particular incidence of state regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control."

With all due respect to the Mississippi Supreme Court we are convinced that in its decision of this case it has fallen into the very error that was referred to by Mr. Justice FRANKFURTER above. It has misconstrued as a local transportation movement entirely subject to state taxation, what is obviously a part of an interstate movement subject to tax if at all only on the portion reasonably apportioned to the State of Mississippi. The tariff collected by the appellant for its part of the interstate movement bears no reasonable relationship to the mileage proportion of the charge for the entire interstate shipment such as was re-

ferred to in the *Central Greyhound Lines, Inc.*, case. This Court in the case of *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, had occasion to consider the application of a local tax to the gross receipts from the portion of an interstate transportation service performed within the boundaries of the taxing district. There the City of New York sought to impose a privilege tax on the business of loading and unloading steamships within New York harbor. In the majority opinion, Mr. Justice REED commented on the apportionment question as follows, at page 427:

> "From the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce and that this rule applies in full force to an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of ad valorem taxes on property. We do not think that a tax on gross income from stevedoring, obviously a 'continuation of the transportation,' is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."

We submit that the revenue from gathering of crude oil from the producing lease tanks in the instant case, its transportation to railroad loading racks and its loading aboard tank cars for continuous transportation outside the state in interstate commerce, like the revenue from stevedoring services in the *Carter & Weekes* case, cannot be prop-

y considered as segregated and apportioned to the local
ing district where the services were performed.

b. The tax in this case is discriminatory regulation:

The Mississippi statute as applied to appellant in this
e is arbitrary and discriminatory in its effect on appel-
t and its competitors transporting oil from points of
gin in Mississippi to destinations outside the state. A
mpetitive pipe line company may install gathering systems
the same fields now served by appellant and under the
plication given this statute if said gathering systems are
nected to interstate trunk lines and shipments are made
m lease tanks to out of state destinations entirely by pipe
e the gross receipts from the *entire shipment from origin
destination,* including the gathering service identical to
t performed by appellant herein are construed to be
mpt from taxation as interstate commerce. Similarly a
mmon carrier by railroad may, under the interpretation
en this statute by the Mississippi courts, construct a
r track into a producing oil field served by appellant's
hering system and ship oil by rail from the producer's
se tanks to the same out of state destination without
ng subject to the imposition of this tax upon either the
l from the field to the main line or the haul from the
ction of the spur via the main line to out of state desti-
ion. We submit that such classification is entirely arbi-
ry and capricious and a tax levied on such basis is a
crimination against and a burden upon appellant's in-
tate business. The decision of the Mississippi Supreme
rt holds that such discrimination was not accidental or
idental but was intended by the Legislature in its enact-
nt of the statute. The court says (35 So. (2d) 77; Tr. 50):

"it was known that all of the oil transported by pipe

line from producing leases or elsewhere would be transported to destinations outside the state either by interstate trunk pipe lines, on a continuous journey, or likewise by railroad from local shipping points within the state. If by the former method, it would of course constitute that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States' and this would be equally true as to the movement by rail of oil from a local shipping point to its destination outside the state in crossing the state line. Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the state where it is then delivered to an interstate carrier prior to the beginning of its ultimate passage to a foreign state in interstate commerce. Most assuredly, no pipe line company would be deemed justified in installing an oil gathering system to transport oil other than that destined for ultimate interstate shipment, there being no oil refineries here."

The tax here in question, as applied by the State of Mississippi, is also discriminatory in that if sustained it may be duplicated or multiplied by the imposition of similar taxes on the unloadng of the oil by the state or district in which it is unloaded from tank cars and piped to the terminal or refinery for reshipment or further processing. Thus, to the two per cent sought to be collected here on the gathering and loading of interstate shipments might be added a like imposition on the unloading at destination. Mr. Justice Reed in the majority opinion in *Joseph* v. *Carter & Weekes*, 330 U. S. 422, 429, summarized the rule with respect to multiple burdens on interstate commerce as follows:

> "A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invali-

dation. *Western Live Stock* v. *Bureau*, 303 U. S. 250; 255 * * *. The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading."

When it is considered that the statute as construed applies only to shipments by combination of pipe line and railroad while exempting completely all-rail and all-pipe-line movements the discriminatory effect on the combination type of interstate transportation here involved is readily apparent.

The foregoing rules with respect to constitutional limitations on the power of state governments to levy privilege taxes on the gross receipts from interstate commerce apply where the Congress has not preempted the regulation of such commerce. They apply with even more force when, as here, the Congress has specifically designated to a federal agency the regulation of the particular type of business involved. The Interstate Commerce Act, as amended June 29, 1906, and as set out in 49 U. S. C. A. 1, provides for regulation of interstate transportation as follows:

"(1) the provisions of this chapter shall apply to common carriers engaged in * * *

(b) the transportation of oil or other commodity, except water and except natural or arti-

ficial gas, by pipe line or *partly by pipe line and partly by railroad* or by water." (Italics ours.)

Congress having provided for federal regulation of common carriers engaged in interstate transportation of oil partly by pipe line and partly by rail, the precise method here involved, the State of Mississippi is without power to regulate these operations whether by direct control or by the equally effective means of taxation. Since the State of Mississippi cannot directly regulate the rates for this business which are solely within the jurisdiction of the Interstate Commerce Commission it may not through discriminatory taxation as here sought to be applied, place interstate carriers at a disadvantage with their intrastate competitors or with other types of interstate transportation with which they are required to compete for business. Such power would, if permitted, allow the State of Mississippi through taxation to usurp the powers delegated by the Congress to the Interstate Commerce Commission to prescribe rates and enforce rules and regulations governing the operations of competitive carriers engaged in transportation of crude oil from Mississippi to destinations outside the state in interstate commerce. This is the type of state obstruction which we believe the Commerce Clause of the Constitution was designed to prevent and which this Court has repeatedly and consistently held it does prohibit.

Conclusion.

The Supreme Court of Mississippi has found that the Mississippi privilege tax levied on "every person engaging * * * in the business of operating a pipe line for transporting from one point to another in this state oil" computed at 2% of "the gross income of the business" applies to the particular activities of this appellant which are involved

herein. These activities consist of gathering oil at lease tanks, transporting it to storage tanks near a railroad siding, and then as fast as the railroad spots its tank cars, loading said oil aboard said cars for shipment out of the state. This oil is tendered to appellant as a common carrier "for transportation to destination named herein, for interstate shipment beyond" and is handled under tariffs filed with the Interstate Commerce Commission. The Mississippi Court based its decision that these activities were subject to the tax on the theory that "this pipe line company was an intrastate carrier." (Tr. 50)

Appellant respectfully submits that the Supreme Court of Mississippi erred in so holding for the reasons that: (*1*) The activities described are in fact a part of interstate commerce, and (*2*) a tax on the privilege of conducting interstate transportation, based on the gross receipts derived therefrom is invalid under the Commerce Clause.

The Supreme Court of Mississippi seemed to base its opinion that appellant was an "intrastate carrier" on the theory that appellant's movement of the oil was merely in preparation for export, "a mere transfer of the property to a depot" (Tr. 51). The court did not recognize that appellant is a common carrier. The court admits in its opinion that if the railroad had built a spur in to each lease tank or if the appellant's gathering lines had connected to a trunk pipe line, that the interstate movement would have started at the lease tanks. We have compared those situations with the facts in this case and have failed to discover any valid distinction which would make appellant an "intrastate carrier."

No valid argument nor jurisprudence is known to appellant to support the contention that the activities herein

were part of intrastate commerce. On the other hand appellant has shown that the activities in question meet all the requirements and tests which have been laid down by this Court for a determination of interstate commerce. The facts show oil tendered by its owner to a common carrier for shipment out of the state. There can be no question that the owner intends to ship the oil out of the state at the time of commitment to the appellant. Oil to become useful must be refined and the Mississippi Supreme Court in its opinion (Tr. 50) finds there are "no refineries here" (in Mississippi). Certainly then when the owner commits the oil to a common carrier with intent to ship it out of the state, the movement has the essential character of interstate commerce, and interstate transportation at that moment commences. Once this stream of commerce has been set in motion there is, in this case, no interruption in it. There is continuity of movement from the moment when the appellant takes possession until the oil is delivered at its final destinations beyond the state line. Any stoppage in transit was only that necessary to transfer the oil from one mode of transportation to another. The Mississippi Court has conceded in its opinion that there was no interruption in the continuity of the movement. Appellant has presented ample authority in support of all its contentions in establishing that the operations involved herein are without question a part of interstate commerce.

Once the determination is made that the transportation herein is interstate commerce, it must be decided whether or not a state has the power to levy a privilege tax based on the gross receipts derived from interstate commerce for the privilege of engaging in such commerce. We have quoted a statement of Mr. Justice Douglas of the present court (329 U. S. 69, 76) that a tax levied for the privilege of doing

interstate business is one of the types of state taxation which has been consistently invalidated by this Court. We have cited cases decided from 1868 to the last term of the Court supporting Mr. Justice DOUGLAS' statement. These cases hold that to allow a state to tax the privilege of engaging in interstate commerce would be to open the door to that very type of interference with interstate commerce which the Federal Constitution was framed to prevent. In addition to the privilege tax cases, we have cited an unbroken line of authority extending from 1887 to the present time holding that state taxes based on gross receipts derived from interstate transportation unless in lieu of property taxation, are invalid. These cases hold that such taxes are so closely tied in to the commerce and are such a direct burden upon it, that if a state has the power to levy such a tax, it has the power to tax interstate commerce out of existence. As has been frequently pointed out, it makes no difference that the same tax is laid on intrastate commerce and that the state would also be taxing its own intrastate commerce out of existence, for it has the right, if it so desires, to do that. But to permit a state to tax interstate commerce to the point of choking it off is certainly to allow interference with such commerce beyond the point allowable under the Commerce Clause. But even if taxes on the privilege of engaging in interstate commerce based on the gross receipts therefrom were permissible, we have seen that the present tax is invalid for the additional reason that it is unapportioned. We have also seen that if permitted, this particular tax would discriminate against the particular type of transportation herein involved. For these reasons we believe that the tax statute herein, as construed and applied to this appellant, must be invalidated unless this Court wishes to specifically overrule many of the cases cited in

Part B of our argument including particularly *Puget Sound Stevedoring Co.* v. *Tax Comm.*, 302 U. S. 90, and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422.

Since the Supreme Court of Mississippi has found that the Mississippi privilege tax based on gross receipts is applicable to the activities of this appellant and since those activities are in fact interstate commerce, the statute in question as applied to this appellant is invalid under the Commerce Clause of the Federal Constitution.

For this reason the appellant respectfully prays that the Honorable Court will reverse the judgment of the Supreme Court of Mississippi in so far as that judgment sustained the validity of the tax collected from this appellant and allow appellant to recover from appellee the sum of $20,296.36, which has been paid under protest, together with interest and costs for refund of which this suit was brought, and to recovery of which appellant is justly entitled.

Respectfully submitted,

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A copy of the above and foregoing brief for appellant has been mailed, postpaid, to J. H. Sumrall, attorney for A. H. Stone, Chairman State Tax Commission, Appellee, this ... day of December, 1948.

....,
Of Counsel for Appellant.